

ESTTA Tracking number: **ESTTA554726**Filing date: **08/19/2013**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	PEPSICO, INC.
Granted to Date of previous extension	08/18/2013
Address	700 ANDERSON HILL ROAD PURCHASE, NY 10577 UNITED STATES

Correspondence information	Elizabeth N. Bilus Attorney of Record PEPSICO, INC. 700 ANDERSON HILL ROAD PURCHASE, NY 10577 UNITED STATES trademarks@pepsico.com, elizabeth.bilus@pepsico.com, donna.j.sanders@pepsico.com Phone:914.253.3443
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Applicant Information

Application No	85555012	Publication date	02/19/2013
Opposition Filing Date	08/19/2013	Opposition Period Ends	08/18/2013
Applicant	Dynamic Mouth Devices LLC 16 Pocono Road, Suite 116 Denville, NJ 07834 UNITED STATES		

Goods/Services Affected by Opposition**Class 010.**

All goods and services in the class are opposed, namely: Dental devices and oral appliances, namely, mouth guards for medical purposes and weight loss purposes; teethers; flavored inserts for mouth guards for medical purposes and weight loss purposes; flavored inserts for teethers; shock absorbing inserts for mouth guards for medical purposes and weight loss purposes; inserts for mouth guards for medical purposes and weight loss purposes that are used for delivering beneficial agents; and inserts for teethers that are used for delivering beneficial agents

Class 028.

All goods and services in the class are opposed, namely: Dental devices and oral appliances, namely, mouth guards for athletic use; flavored inserts for mouth guards for athletic use; shock absorbing inserts for mouth guards for athletic use; and inserts for mouth guards for athletic use that are used for delivering beneficial agents

Grounds for Opposition

Deceptiveness	Trademark Act section 2(a)
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False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)

Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	824151	Application Date	09/09/1966
Registration Date	02/14/1967	Foreign Priority Date	NONE
Word Mark	PEPSI-COLA		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class U045 (International Class 032). First use: First Use: 1898/00/00 First Use In Commerce: 1898/00/00 SOFT DRINKS AND SYRUPS AND CONCENTRATES FOR THE PREPARATION THEREOF		

U.S. Registration No.	824150	Application Date	09/09/1966
Registration Date	02/14/1967	Foreign Priority Date	NONE
Word Mark	PEPSI		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class U045 (International Class 032). First use: First Use: 1911/11/21 First Use In Commerce: 1911/11/21 SOFT DRINKS AND SYRUPS AND CONCENTRATES FOR THE PREPARATION THEREOF		

U.S. Registration No.	3659286	Application Date	10/06/2008
Registration Date	07/21/2009	Foreign Priority Date	NONE
Word Mark	PEPSI		
Design Mark			
Description of Mark	The mark consists of the word "PEPSI" in a stylized format.		
Goods/Services	Class 032. First use: First Use: 2008/12/00 First Use In Commerce: 2008/12/00 Concentrates, syrups or powders used in the preparation of soft drinks; Soft drinks		

U.S. Registration No.	3674350	Application Date	10/06/2008
Registration Date	08/25/2009	Foreign Priority Date	NONE
Word Mark	PEPSI		
Design Mark			
Description of	The mark consists of the word "PEPSI" in white vertical stylized letters above a		

Mark	globe device containing three fields; the first field is red, the second field is white, the third field is blue, and a white border surrounds the globe device. The black in the drawing represents background color and/or transparent areas and is not a part of the mark.		
Goods/Services	Class 032. First use: First Use: 2008/12/00 First Use In Commerce: 2008/12/00 Soft drinks		

U.S. Registration No.	3684303	Application Date	10/06/2008
Registration Date	09/15/2009	Foreign Priority Date	NONE
Word Mark	PEPSI		
Design Mark			
Description of Mark	The mark consists of the word "PEPSI" in vertical stylized letters and a globe device containing three fields whereby the middle field divides the globe and the globe device is surrounded by a border.		
Goods/Services	Class 032. First use: First Use: 2008/12/00 First Use In Commerce: 2008/12/00 Soft drinks		

U.S. Registration No.	3684305	Application Date	10/06/2008
Registration Date	09/15/2009	Foreign Priority Date	NONE
Word Mark	PEPSI		
Design Mark			
Description of Mark	The mark consists of the word "PEPSI" in stylized letters and a globe device containing three fields whereby the middle field divides the globe and the globe device is surrounded by a border.		
Goods/Services	Class 032. First use: First Use: 2008/12/00 First Use In Commerce: 2008/12/00 Soft drinks		

U.S. Registration No.	3681394	Application Date	11/24/2008
Registration Date	09/08/2009	Foreign Priority Date	NONE
Word Mark	PEPSI		
Design Mark			
Description of Mark	The mark consists of a globe device containing three fields whereby the middle field divides the globe and beneath the globe device is the word "PEPSI" in stylized letters.		
Goods/Services	Class 032. First use: First Use: 2009/03/02 First Use In Commerce: 2009/03/02 Soft drinks		

U.S. Registration No.	3684304	Application Date	10/06/2008
Registration Date	09/15/2009	Foreign Priority Date	NONE
Word Mark	PEPSI		
Design Mark			
Description of	The mark consists of the word "PEPSI" in white stylized letters and a globe		

Mark	device containing three fields; the first field is red, the second field is white, the third field is blue, and a white border surrounds the globe device. The black in the drawing represents background and/or transparent areas and is not part of the mark.
Goods/Services	Class 032. First use: First Use: 2008/12/00 First Use In Commerce: 2008/12/00 Soft drinks

U.S. Registration No.	3774833	Application Date	10/29/2009
Registration Date	04/13/2010	Foreign Priority Date	NONE
Word Mark	PEPSI		
Design Mark			
Description of Mark	The mark consists of A GLOBE DEVICE CONTAINING THREE FIELDS; THE FIRST FIELD IS RED, THE SECOND FIELD IS WHITE, THE THIRD FIELD IS BLUE, AND A WHITE BORDER SURROUNDS THE GLOBE DEVICE. UNDERNEATH THE GLOBE IS THE WORD "PEPSI" IN WHITE VERTICAL STYLIZED LETTERS. THE ENTIRE MARK IS ON A DARK BLUE BACKGROUND.		
Goods/Services	Class 032. First use: First Use: 2008/12/00 First Use In Commerce: 2008/12/00 Soft drinks		

U.S. Registration No.	3140551	Application Date	08/31/2005
Registration Date	09/05/2006	Foreign Priority Date	NONE
Word Mark	PEPSI VANILLA		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 003. First use: First Use: 2006/03/00 First Use In Commerce: 2006/03/00 Lip balm; lip gloss		

U.S. Registration No.	3140552	Application Date	08/31/2005
Registration Date	09/05/2006	Foreign Priority Date	NONE
Word Mark	PEPSI WILD CHERRY		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 003. First use: First Use: 2006/03/00 First Use In Commerce: 2006/03/00 Lip balm; Lip gloss		

U.S. Registration No.	2845054	Application Date	10/17/2003
Registration Date	05/25/2004	Foreign Priority Date	NONE
Word Mark	PEPSI		
Design Mark			

Description of Mark	NONE
Goods/Services	<p>Class 018. First use: First Use: 2003/04/00 First Use In Commerce: 2003/04/00 [BACKPACKS,] SPORTS DUFFEL BAGS [, GOLF UMBRELLAS, PATIO UMBRELLAS, LUGGAGE TAGS]</p> <p>Class 020. First use: First Use: 2003/04/00 First Use In Commerce: 2003/04/00 [PORTABLE CHAIRS, INFLATABLE CHAIRS, STADIUM CUSHIONS]</p> <p>Class 021. First use: First Use: 2003/04/00 First Use In Commerce: 2003/04/00 [SPORTS BOTTLES SOLD EMPTY, PORTABLE BEVERAGE COOLERS, BOTTLE OPENERS]</p> <p>Class 025. First use: First Use: 2003/04/00 First Use In Commerce: 2003/04/00 CLOTHING, NAMELY,[JACKETS,] KNIT SHIRTS [, SWEATSHIRTS, T-SHIRTS, CAPS]</p> <p>Class 028. First use: First Use: 2003/04/00 First Use In Commerce: 2003/04/00 [GOLF BALLS, GOLF TEES, TOY FLYING SAUCERS FOR TOSS GAMES, SOCCER BALLS, BALLOONS, YO-YOS, BOUNCING BALLS]</p>

U.S. Registration No.	2354103	Application Date	07/09/1998
Registration Date	05/30/2000	Foreign Priority Date	NONE
Word Mark	PEPSI CENTER		
Design Mark			
Description of Mark	NONE		
Goods/Services	<p>Class 041. First use: First Use: 1999/10/00 First Use In Commerce: 1999/10/00 Operation of a sports, entertainment, convention and exhibition arena, and production of sports and entertainment events for public exhibition and television and radio broadcast</p>		

Attachments	Notice of Opposition - PEPSIP.pdf(1939048 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/Donna J. Sanders/
Name	Donna J. Sanders
Date	08/19/2013

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

IN THE MATTER OF APPLICATION

Mark	: PEPSIP
Applicant	: Dynamic Mouth Devices LLC
Serial No.	: 85/555,012
Filed	: February 28, 2012
Published in the <u>Official Gazette</u>	: February 19, 2013

	:	X
PEPSICO, INC.,	:	
	:	
Opposer,	:	Opposition No.
	:	
v.	:	
	:	
DYNAMIC MOUTH DEVICES LLC,	:	
	:	
Applicant.	:	
	:	X

NOTICE OF OPPOSITION

Opposer, PepsiCo, Inc. ("PepsiCo" or "Opposer"), a North Carolina corporation having a place of business at 700 Anderson Hill Road, Purchase, New York 10577, believes that it will be damaged by the registration of United States Trademark Application Serial No. 85/555,012, filed on February 28, 2012, in the name of Dynamic Mouth Devices LLC (hereinafter "Applicant") for the alleged mark PEPSIP based on an intention to use the mark on or in connection with "Dental devices and oral appliances, namely, mouth guards for medical purposes and weight loss purposes; teethers; flavored inserts for mouth guards for medical purposes and weight loss purposes; flavored inserts for teethers; shock absorbing inserts for mouth guards for medical purposes and weight loss purposes; inserts for mouth guards for medical purposes and weight loss purposes that are used for delivering beneficial agents; and inserts for teethers that are used

for delivering beneficial agents" in International Class 10, and with "Dental devices and oral appliances, namely, mouth guards for athletic use; flavored inserts for mouth guards for athletic use; shock absorbing inserts for mouth guards for athletic use; and inserts for mouth guards for athletic use that are used for delivering beneficial agents" in Class 28, and, having been previously granted an extension of time to oppose, hereby opposes the foregoing application.

The specific grounds for this opposition are as follows:

1. PepsiCo, through its predecessors in interest, has been engaged in the beverage business for over 100 years and has become well and favorably known to members of the public, as well as to members of the beverage industry, for quality beverage products and related services. It owns a portfolio of brands that identify carbonated soft drinks, juices and juice drinks, ready-to-drink teas and coffee drinks, isotonic sports drinks, bottled water and enhanced waters, and related products and services.
2. For over a century, PepsiCo has used the mark PEPSI in connection with various beverages and other products, as well as advertising, marketing, sales and promotional services to authorized bottlers and independent distributors and retailers of those products.
3. Since long prior to the filing date of the application-at-issue, PEPSI has been identified with Opposer and has appeared on a tremendous amount of product packaging, advertising, in-store display racks, signage, point-of purchase material, etc.
4. Opposer's PEPSI products are marketed and sold in vast quantities on a nationwide basis, supported by many hundreds of millions of dollars of advertising and promotion each year. Opposer's products are sold in almost every supermarket in the United States as well as in mass merchandise stores, numerous convenience stores, vending machines, and other outlets.

5. The extensive commercial acceptance and success of many of Opposer's PEPSI products for over 100 years is due in large measure to the substantial advertising and marketing efforts of PepsiCo. Such efforts have included the use of celebrities and artists to advance and promote the products. Opposer has, by virtue of such extensive usage, advertising and promotion, built up a very high level of consumer and trade recognition symbolized by its mark PEPSI and variants. Retail sales of beverage products marketed under Opposer's mark PEPSI and variants in the United States alone have exceeded many billions of dollars.

6. PepsiCo's use of the mark PEPSI and variants also extends beyond beverages, per se, and includes other products and services. Indeed, for several years now, PepsiCo has been licensing the PEPSI mark for use on clothing, drinking vessels, umbrellas, duffel bags, lip balm and other products for retail sale. PepsiCo also organizes, markets, promotes and sponsors entertainment and sporting events. PEPSI also sponsors sporting and entertainment facilities, such as the PEPSI CENTER in Denver, Colorado, and is currently sponsoring the X-Factor television show on FOX. PepsiCo also conducted the PEPSI REFRESH PROJECT, through which it provided funding to numerous diverse causes selected by the public.

7. PepsiCo also maintains a strong and innovative internet presence through which it markets, advertises and promotes many of the foregoing PEPSI products and services, among others. PepsiCo's websites include, without limitation, PEPSI.COM and REFRESHEVERYTHING.COM, which are operational twenty-four hours a day, seven days a week. PepsiCo also maintains a Facebook page and YouTube Channel dedicated to promoting the PEPSI brand.

8. Due to such extensive and continuous advertising, sale, use and promotion of soft drinks and related products and services under or in connection with Opposer's marks PEPSI and

variants for decades, these marks have not only acquired substantial public and consumer recognition throughout the United States, but have also enjoyed valuable goodwill, and become famous, solely signifying Opposer as the source of products and services of high quality.

9. In addition to its prior common law rights in the marks PEPSI and variants, Opposer is also the owner of over 90 live United States trademark and service mark applications and registrations, each of which incorporate the designation PEPSI or variants thereof, including, but not limited to, the following:

MARK	REG. NO.	REG. DATE	FIRST USE DATE	IDENTIFICATION OF GOODS
PEPSI-COLA	824151	Feb. 14, 1967	1898	Soft drinks and syrups and concentrates for the preparation thereof
PEPSI	824150	Feb. 14, 1967	Nov. 21, 1911	Soft drinks and syrups and concentrates for the preparation thereof
PEPSI (Stylized)	3659286	July 21, 2009	Dec. 2008	Concentrates, syrups or powders used in the preparation of soft drinks; Soft drinks
PEPSI & Design	3674350	Aug. 25, 2009	Dec. 2008	Soft drinks
PEPSI & Design	3684303	Sept. 15, 2009	Dec. 2008	Soft drinks
PEPSI & Design	3684304	Sept. 15, 2009	Dec. 2008	Soft drinks
PEPSI & Design	3684305	Sept. 15, 2009	Dec. 2008	Soft drinks
PEPSI & Design	3681394	Sept. 8, 2009	Mar. 2, 2009	Soft drinks
PEPSI & Design	3774833	Apr. 13, 2010	Dec. 2008	Soft drinks
PEPSI VANILLA	3140551	Sept. 5, 2006	Mar. 2006	Lip balm; lip gloss
PEPSI WILD CHERRY	3140552	Sept. 5, 2006	Mar. 2006	Lip balm; lip gloss
PEPSI & Design	2845054	May 25, 2004	Apr. 2003	Sports duffel bags; clothing, namely, knit shirts
PEPSI CENTER	2354103	May 30, 2000	Oct. 1999	Operation of a sports, entertainment, convention and exhibition arena, and production of sports and entertainment events for public exhibition and television and radio broadcast

10. Opposer's registrations for these marks are valid, subsisting, in full force and effect, uncanceled and unrevoked, and serve as evidence of Opposer's exclusive right to use such marks in commerce on or in connection with the goods or services identified in the registrations, as provided by Section 33(a) of the United States Trademark (Lanham) Act, 15 U.S.C. § 1115(a). Further, many of Opposer's registrations have become incontestable pursuant to Section 15 of the Lanham Act, 15 U.S.C. § 1065. Hereinafter PepsiCo's foregoing marks, including those registered and/or used in commerce, are referred to individually and/or collectively as the "PEPSI Marks", unless otherwise specified.

11. Use of the PEPSI Marks has been continuous, and they have not been abandoned. As a result of the long, extensive and widespread use, advertising, promotion and registration of the PEPSI Marks on and in association with PepsiCo's various goods and services, including, but not limited to, various beverage products, consumers have become accustomed to associating marks consisting of or containing the term "PEPSI" with a single source, that is, PepsiCo.

12. In view of such substantial usage, the PEPSI Marks, including PEPSI, became famous long prior to the filing date of the application at issue. Indeed, the PEPSI brand is one of the most renowned brands in the United States, representing assets of enormous goodwill and of inestimable value to PepsiCo.

13. On information and belief, on February 28, 2012, Applicant, Dynamic Mouth Devices LLC, a New Jersey corporation having a place of business at 16 Pocono Road, Suite 116, Denville, New Jersey 07834, filed Application Serial No. 85/555,012 to register PEPSIP, based on an intent to use the alleged mark in connection with "Dental devices and oral appliances, namely, mouth guards for medical purposes and weight loss purposes; teethers; flavored inserts for mouth guards for medical purposes and weight loss purposes; flavored inserts

for teethers; shock absorbing inserts for mouth guards for medical purposes and weight loss purposes; inserts for mouth guards for medical purposes and weight loss purposes that are used for delivering beneficial agents; and inserts for teethers that are used for delivering beneficial agents" in International Class 10, and with "Dental devices and oral appliances, namely, mouth guards for athletic use; flavored inserts for mouth guards for athletic use; shock absorbing inserts for mouth guards for athletic use; and inserts for mouth guards for athletic use that are used for delivering beneficial agents" in Class 28.

14. Registration of Applicant's alleged mark, which is the subject of the application-in-opposition, is barred by the provisions of Section 2(d) of the Trademark Act of 1946 because the said mark consists of or comprises a mark which so resembles Opposer's PEPSI Marks which have been in use and are also the subject of prior registrations or previously filed applications to register marks in the United States Patent and Trademark Office, as to be likely, when used in connection with the alleged products of the Applicant to cause confusion, mistake or deception.

15. Opposer has priority over Applicant because Opposer's use, application filing dates and/or registration dates for the PEPSI Marks precede the Applicant's filing date for its application at issue and/or any alleged date of first use of Applicant's purported mark which is the subject of the application-in-opposition.

16. Applicant's alleged mark PEPSIP, which is the subject of the application-in-opposition, and Opposer's PEPSI Marks are similar. On information and belief, the products in connection with which Applicant's alleged mark is intended to be used or applied for and the goods/services in connection with which Opposer's PEPSI Marks are registered and/or used are similar, complementary and/or related.

17. Accordingly, Applicant's alleged mark shown in the application-in-opposition so resembles Opposer's foregoing and previously used and/or registered PEPSI Marks, including PEPSI, as to be likely to cause confusion, to cause mistake or to deceive with consequent injury to Opposer. The likelihood of confusion, mistake or deception that would also arise from concurrent use and registration of the applied for mark PEPSIP with Opposer's use and registration of its PEPSI Marks is that (a) persons are likely to believe that Applicant's products have their source in Opposer, or (b) that Applicant and its products are a version of Opposer's marks or are in some way legitimately connected or affiliated with, sponsored, approved, endorsed or licensed by Opposer when, in fact, they are not.

18. In view of the foregoing, registration of Applicant's alleged mark PEPSIP, which is the subject of the application-in-opposition, is barred from registration because it consists of or comprises a mark which so resembles Opposer's previously used and/or registered PEPSI Marks, as to be likely, when used in connection with the alleged products of the Applicant, to cause confusion, mistake or deception.

19. Further, Opposer's inherently distinctive PEPSI Marks, including PEPSI, became famous prior to the filing date of Applicant's application-in-opposition and/or any claimed date of first use by Applicant of the alleged mark shown in U.S. Application Serial No. 85/555,012. Registration, and use of Applicant's alleged mark would likely dilute Opposer's famous and inherently distinctive PEPSI Marks in violation of 15 U.S.C. § 1125(c). Accordingly, Applicant's alleged mark PEPSIP is not entitled to registration under 15 U.S.C. § 1052(f) and Section 13 of the Lanham Act, 15 U.S.C. § 1063.

20. PepsiCo will be damaged by the issuance of a registration sought by Applicant within the meaning of 15 U.S.C. § 1063 because such registration would support and assist

Applicant in the confusing, misleading, deceptive and/or dilutive use of Applicant's alleged PEPSIP mark, and would give color of exclusive statutory rights to Applicant in violation and derogation of the prior and superior rights of PepsiCo.

WHEREFORE, Opposer prays that this opposition be sustained in its favor, that registration be denied to Applicant on its Application Serial No. 85/555,012 and that the Board grant all further relief to Opposer that is necessary and just in these circumstances.

Respectfully submitted,

PEPSICO, INC.

Dated: August 16, 2013

By:



Elizabeth N. Bilus
700 Anderson Hill Road
Purchase, NY 10577
(914) 253-3443

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, NOTICE OF OPPOSITION, was served on Applicant at the correspondence address of record via overnight courier, in an envelope with sufficient postage addressed to:

Gregory M. Reilly
Lerner, David, Littenberg, Krumholz & Mentlik, LLP
600 South Avenue W Suite 2
Westfield, New Jersey 07090-1497

on August 19, 2013

By: Donna Sanders